

CONTENT-NEUTRAL AND CONTENT-BASED REGULATIONS  
OF SPEECH: A DISTINCTION THAT IS NO LONGER WORTH  
THE FUSS

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INTRODUCTION

The binary distinction between content-neutral and content-based speech regulations is of central importance in First Amendment doctrine.<sup>1</sup> This distinction has been the subject of U.S. Supreme Court attention on several occasions.<sup>2</sup> As the case law has evolved, however, this apparently crucial distinction has become less clear, coherent, and practical, such

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1. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 53 (2000); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996); Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1263 (2014).

2. For example, Justice Sandra Day O'Connor broadly endorsed the distinction in *City of Ladue*, 512 U.S. at 59–60.

that further attempts to establish any clear hierarchical distinction are no longer worth the effort.

This surprising state of affairs has arisen from several judicial developments, operating jointly as well as separately. These developments,<sup>3</sup> discussed below,<sup>4</sup> have eroded a basic assumption underlying much of free speech jurisprudence: that content-based restrictions are uniformly subjected to a more rigorous, exacting, and demanding judicial scrutiny than are content-neutral restrictions.<sup>5</sup> As the validity of this assumption has become more dubious, the clarity, coherence, and practical significance of the distinction between content-neutral and content-based regulations have eroded beyond the point of recoverability.

This Essay establishes that content-based restrictions on speech are no longer uniformly subjected to unequivocally more demanding judicial scrutiny than content-neutral restrictions by examining several recent jurisprudential trends and their effects.<sup>6</sup> The five relevant trends are (1) the compounding complications and failed attempts in seeking to distinguish between content-neutral and content-based regulations of speech in the first place; (2) the crucial judicial option, distinctively available in content-neutral regulation cases, to insist on the realistic availability of ample valued alternative channels through which speakers can continue to convey their message; (3) in partial offset thereof, the rise of the judicial option, thus far in content-based but not yet content-neutral speech regulation cases, to interpret strict scrutiny<sup>7</sup> to require something such as compelling empirical evidence, grounds, and proof of the relevant causation and the effectiveness of the particular speech regulation; (4) the growth of judicial self-indulgence and untested judicial speculation in relying on the supposed availability of uniformly less speech-restrictive and thus more narrowly tailored<sup>8</sup> regulatory regimes; and finally (5) the malleability, if not the sheer arbitrariness, of judicial descriptions of the public interests underlying speech regulations such that the interest may seem to be of compelling gravity or weight<sup>9</sup> under one judicial description but not under an arguably quite sensible alternative description.<sup>10</sup>

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3. See *infra* text accompanying notes 6–10.

4. See *infra* Parts II–III.

5. See, e.g., cases cited *infra* note 11.

6. See *infra* Parts II–III.

7. For standard formulations of strict scrutiny, see, for example, the cases cited *infra* note 11.

8. For a discussion of narrow tailoring, see R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 167, 183, 186–87 (1997) [hereinafter Wright, *Fourteen Faces of Narrowness*].

9. For discussions of compelling or overridingly important governmental interests, see cases cited *infra* notes 1178–21.

10. These five concerns are elaborated *infra* Parts I–III.

Taken separately and in conjunction, these five trends have disrupted any unambiguous hierarchy of rigor as between content-based and content-neutral judicial scrutiny. These trends have more broadly undermined—beyond effective retrieval—any sufficient clarity, coherence, and practical public value of the distinction between content-based and content-neutral regulations. The five relevant trends and their relevant effects are elaborated below.

# I. SEEKING MERELY TO DISTINGUISH BETWEEN CONTENT-NEUTRAL AND CONTENT-BASED RESTRICTIONS ON SPEECH

Scholars have recognized a range of important problems associated with the jurisprudence of supposedly content-neutral and content-based regulations of speech for some time. For purposes of this Essay, the narrower focus herein is on the sheer unmanageability of the distinction itself, as in the futile attempts to establish a clear and useful distinction between the two categories in even the most recent, thoughtful, and self-conscious cases. To illustrate the basic problem through the most recent case law, it is helpful to begin with a brief reminder of the differences in the judicial tests applied to regulations of speech, which are contingent upon the initial classification as content-neutral or content-based.

Once a court has made the initial classification, content-based regulations of speech are generally subjected to a particularly rigorous and exacting degree of judicial scrutiny.<sup>11</sup> Traditionally, this strict scrutiny encompasses two requirements. Specifically, the speech regulation in such a case must promote a compelling or overridingly important government interest, and the regulation must be necessary to the narrowly tailored promotion of that interest.<sup>12</sup>

Of late, there has been some interest in modifying the standard application of strict scrutiny uniformly in all content-based speech regulation cases.<sup>13</sup> Thus, Justices Stephen Breyer and Elena Kagan have raised the possibility of a constitutional test in which the degree of judicial rigor is merely proportionate or somehow fitting to the perceived degree of harm addressed by the regulation,<sup>14</sup> along with other relevant

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11. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) (plurality opinion) (referring to it as “the ‘most exacting scrutiny’” (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994))); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

12. See, e.g., *Alvarez*, 132 S. Ct. at 2548–49; *Brown*, 131 S. Ct. at 2738; *Playboy*, 529 U.S. at 813; *Sable*, 492 U.S. at 126.

13. See, e.g., *Alvarez*, 132 S. Ct. at 2551–52 (Breyer, J., concurring).

14. See *id.*

considerations.<sup>15</sup> At present, the law supposedly requires the most demanding scrutiny of standard content-based regulations of speech.<sup>16</sup> Whether the Breyer–Kagan approach is nonetheless of normative or descriptive interest may, however, be worthy of serious reflection.<sup>17</sup>

In contrast to the most typical approaches to speech restrictions categorized as content-based, content-neutral regulations commonly receive less exacting, less demanding, mid-level judicial scrutiny. There are certainly variations among the content-neutral test formulations,<sup>18</sup> but the most broadly applied formulations seem to require a significant or substantial government interest.<sup>19</sup> There must then be reasonable or proportionate, if imperfect, tailoring of the regulation to address the significant government interest.<sup>20</sup> And, crucially for this Essay's purposes, content-neutral speech regulations must assumedly "leave open ample alternative channels for communication of the information"<sup>21</sup> in question.

The main argument below is that in practice there are insufficient grounds to think of the primary content-based speech regulation tests as systematically more rigorous, demanding, or speech-protective than the

15. *See id.* at 2551 (listing the importance of the provision's objectives, the extent to which the provision will achieve the objectives, and other less restrictive alternatives as additional considerations); *see also* *Denver Area Telecomms. Consortium v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion) (noting the Court's aversion to imposing judicial restraints amounting to a "straightjacket").

16. *See* cases cited *supra* note 11.

17. Each of the Sections below shed some light on the Breyer–Kagan "proportionality" or broad-based balancing review of what are typically treated, binarily, as either content-based or content-neutral regulations.

18. For reasons not fully articulated, the Court seems to dispense with the otherwise standard requirement that the content-neutral speech regulation leave open ample alternative speech channels in at least some cases involving a mixture of speech and conduct, known as symbolic conduct. For the standard alternative speech channels requirement, *see*, for example, *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). For the absence of such a requirement, *see* *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289–90 (2000) (plurality opinion) (commercial barroom nude dancing); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (plurality opinion) (nude dancing); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (draft card burning). Mid-level scrutiny tests in other constitutional contexts also are not invariably intended to be less than rigorous. *See*, for example, the "exceedingly persuasive" justification required in some gender equal protection contexts, as in *United States v. Virginia*, 518 U.S. 515, 531–33 (1996); *id.* at 559 (Rehnquist, C.J., concurring).

19. *See, e.g., McCullen*, 134 S. Ct. at 2529, 2534 (quoting *Ward*, 491 U.S. at 796); *Clark*, 468 U.S. at 293.

20. *See* sources cited *supra* note 19. This Essay does not consider questions as to whether inquiring into the nature or weight of the one or more relevant government interests can really be separated from inquiries into the degree of tailoring involved.

21. *McCullen*, 134 S. Ct. at 2529 (quoting *Ward*, 491 U.S. at 791).

most typical content-neutral tests. Stated more broadly, the distinction between content-based and content-neutral tests is no longer worth maintaining. But it should not be casually assumed that the underlying distinction between content-based and content-neutral regulations itself is clear.

The broad range of problems associated with the distinction between content-based and content-neutral speech regulations in general appear elsewhere.<sup>22</sup> However, the courts' understandable inability to uniformly and consistently settle upon even the basic elements of content-neutrality is important for this Essay's analysis.<sup>23</sup>

One such basic conflict is between formalist, or narrowly literalist, approaches and more pragmatist, substantive, motivationalist, justificationalist approaches to content-neutrality. Very roughly, the conflict in this respect has been between formalist approaches that ask whether the applicability of the speech regulation depends upon merely reading or otherwise examining the content of the speech,<sup>24</sup> or on a more pragmatic inquiry into whether the regulation is motivated or justified by

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22. See, e.g., Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 729 & n.8 (1980); Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 803 (2004); Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 596–97 (2003); Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 232–33 (2012); Kreimer, *supra* note 1, at 1267–68; Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114 (1981); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 205–06 (1982); R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 335 (2006).

23. See Stephan, *supra* note 22, at 205 (concluding that the Court provides “mixed signals” to lower courts).

24. See, e.g., *McCullen*, 134 S. Ct. at 2531 (asking whether the authorities must “examine the content of the message” (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)) (internal quotation marks omitted)); *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (“It was what Westboro said that exposed it to tort damages.”); *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (stating that a regulatory scheme that requires the government to “examine the content of the message that is conveyed” is content-based, independent of its intent or motivating purposes (quoting *League of Women Voters*, 468 U.S. at 383) (internal quotation marks omitted)); *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011) (holding that a regulation is content-based if an examination of the speech content is required to apply the regulation); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263–66 (11th Cir. 2005) (reviewing a sign code’s exemptions as plainly content-based); *Loper v. N.Y.C. Police Dep’t*, 999 F.2d 699, 705 (2d Cir. 1993) (noting that a municipal anti-begging ordinance was “not content neutral because it prohibits all speech related to begging,” or at least all speech in the form of begging, as distinct, perhaps, from speech advocating a right to beg); *Benefit v. City of Cambridge*, 679 N.E.2d 184, 189 (Mass. 1997) (“The statute is . . . necessarily content based because the content of the individual’s message determines criminal guilt or innocence.”).

reasons somehow independent of the content of the speech, including disapproval of the content of the message.<sup>25</sup>

Both the formalist and the pragmatist approaches can, not surprisingly, quickly become rather murky in their definition and scope. But the otherwise appealing pragmatist approaches have thus far exhibited more internal complications, if not sheer inconsistencies. Judicial declarations intended to clarify, restate, or elaborate upon a pragmatist test formulation often unintentionally depart from other similarly intended declarations.

Consider, for example, the fraying of the basic idea that “[t]he principal inquiry” in distinguishing content-based from content-neutral regulations “is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>26</sup> The very idea of a “principal” inquiry itself implies the possibility of other, non-principal inquiries. Additionally, the main concern in many cases will not be why the regulation was “adopted;” rather, it will be why the regulation was later applied in a given case,<sup>27</sup> and perhaps not elsewhere.

Most importantly, the idea of restricting a message because of “disagreement” requires much deeply controversial development. Must a government actor disagree with the message, or could a restriction be content-based if the disagreement with the message was solely that of some third party, as in some “heckler’s veto”<sup>28</sup> cases? It also seems

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25. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 719–20 (2000) (focusing on the “principal,” if not exclusive, issue of disagreement with the regulated message (quoting *Ward*, 491 U.S. at 791) (internal quotation marks omitted)); *Ward*, 491 U.S. at 791 (focusing primarily on whether the speech regulations “are justified without reference to the content of the regulated speech” (quoting *Clark*, 468 U.S. at 293) (internal quotation marks omitted)); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (analyzing the ordinance in question using “justified without reference to the content of the regulated speech” as the authoritative speech regulation definition (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)) (internal quotation marks omitted)); *Ross v. Early*, 746 F.3d 546, 552 (4th Cir. 2014) (applying the “justified without reference to the content of the regulated speech” language to public sidewalk regulation (quoting *Clark*, 468 U.S. at 293) (internal quotation marks omitted)); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013) (noting that “not every content distinction merits strict scrutiny”); *Brown v. Town of Carey*, 706 F.3d 294, 301 (4th Cir. 2013) (asking “why—not whether—the Town has distinguished content in its regulation”); *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 366 (4th Cir. 2012) (distinguishing a preferred, “more practical” inquiry into content-neutrality from a “formalistic” approach).

26. *Ward*, 491 U.S. at 791.

27. See generally Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657 (2010) (examining the dichotomy of as-applied and facial challenges).

28. See, e.g., *Ctr. for Bio-Ethical Reform v. L.A. Cnty.*, 533 F.3d 780, 788 (9th Cir. 2008). For more background on what now are designated as “heckler’s veto” cases, see *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation.”); *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 508–09 (1969) (holding that public school students’ protests were protected because they did not

arbitrary to confine content-based restrictions to cases of anyone's "disagreement"<sup>29</sup> with the message of a speech. Suppose a government genuinely agreed with a message but also considered the message to be premature, politically embarrassing, or susceptible to misunderstanding and overreaction. Then, on that basis, the government suppressed the message.<sup>30</sup> Why could that not be a content-based regulation?

Depending upon how the courts choose to answer any of the above questions, the boundary line between content-based and content-neutral speech regulations will vary. But thoughtful judicial attempts to clarify the doctrine have compounded the loss of clarity and the confusion over the scope of the more pragmatic approaches to content-neutrality.

Consider, for example, the pragmatic approaches to content-neutrality that seek to bar (1) government supervision of the "marketplace of ideas";<sup>31</sup> (2) government control, more narrowly, over "which issues are worth discussing";<sup>32</sup> (3) government censorial intent;<sup>33</sup> (4) government censorial intent specifically "to value some forms of speech over others";<sup>34</sup> (5) government censorial intent in the specific form of valuing some forms of speech over other forms "to distort public debate";<sup>35</sup> (6) restriction of expression "because of its message, its ideas, its subject matter";<sup>36</sup> (7) prohibition of "the expression of an idea simply because society [as perhaps distinct from the government] finds the idea itself offensive or disagreeable";<sup>37</sup> (8) creation of a "substantial risk of eliminating certain ideas or viewpoints" from the public forum";<sup>38</sup> (9)

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"intrude[] upon the work of the schools or the rights of other students"); *Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949). For a reference specifically to government disapproval of a message as the central judicial concern, see *Thayer v. Worcester*, 755 F.3d 60, 68 (1st Cir. 2014) (Souter, J., sitting by designation).

29. *Ward*, 491 U.S. at 791.

30. A prohibition of publishing the sailing dates of troop ships in wartime would presumably be content-based, but hardly because of anyone's disagreement with the presumably accurate information conveyed. See the hypothetical referred to in *Near v. Minnesota*, 283 U.S. 697, 716 (1931). A "censorial" impulse thus does not imply any disagreement with the substantive content of what is sought to be conveyed.

31. *E.g.*, *Brown v. Town of Carey*, 706 F.3d 294, 301 (4th Cir. 2013) (quoting *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537–38 (1980)) (internal quotation marks omitted).

32. *E.g.*, *id.* (quoting *Consol. Edison Co.*, 447 U.S. at 537–38) (internal quotation marks omitted).

33. *See id.*

34. *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).

35. *Id.*

36. *E.g.*, *Carey*, 706 F.3d at 301 (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)) (internal quotation marks omitted).

37. *Id.* at 302.

38. *E.g.*, *Serv. Emps. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010) (quoting *Horton v. City of Houston*, 179 F.3d 188, 193 (5th Cir. 1999)).

creation of “distinctions between ‘favored speech’ and ‘disfavored speech’”;<sup>39</sup> and (10) regulations that confer benefits or impose burdens without “reference to the ideas or views expressed.”<sup>40</sup>

It is fair to say that each of the ten formulas listed above has the potential for including or excluding as content-neutral some regulation not similarly classed by one or more of the remaining formulas. The ten formulas have family resemblances but no more in common. Working through the various possible conflicts would be tedious and unnecessary. Merely for the sake of example, though, it is plain that not all disfavoring of particular speech involves “a substantial risk of eliminating”<sup>41</sup> that speech from any forum. Nor is restriction of all speech on some given subject<sup>42</sup> coextensive with restricting speech on only one disfavored viewpoint<sup>43</sup> on that given subject.

Examples of these definitional inconsistencies could easily be multiplied. But the point is simply that those who assert that content-neutral speech regulation is unequivocally less rigorous and less demanding than content-based speech regulation should at least recognize a remarkable lack of clarity and consistency in the basic categories with which they must work.

## II. ALTERNATIVE SPEECH CHANNELS AS A CONSTITUTIONAL REQUIREMENT UNIQUE TO CONTENT-NEUTRAL REGULATIONS

It seems well settled that content-neutral, but not content-based, restrictions on speech must leave ample alternative channels available for conveying the speaker’s message.<sup>44</sup> The standard multipart test requires

39. *E.g.*, *Local 5*, 595 F.3d at 596 (quoting *Horton*, 179 F.3d at 193).

40. *See* *Wagner v. City of Garfield Heights*, 577 Fed. App’x 488, 493 (6th Cir. 2014) (citing *Turner Broad. Syst. v. FCC*, 512 U.S. 622, 643 (1994)).

41. *See supra* notes 38–39 and accompanying text.

42. *See supra* text accompanying note 36. For a sense of the continuing lack of clarity regarding speech restrictions based on subject matter, see, for example, *Solantic v. City of Neptune*, 410 F.3d 1250, 1259 (11th Cir. 2005) (explaining content-neutrality as requiring no restrictions on subject matter); *Norton v. City of Springfield*, 768 F.3d 713, 716 (7th Cir. 2014) (“Government regularly distinguishes speech by subject-matter, and the Court does not express special concern.”); *Asgeirsson v. Abbott*, 696 F.3d 454, 458 (5th Cir. 2012) (determining “public policy” in itself to be a subject matter and the speech regulation thereof to be content-neutral). *But see* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506–07 (1969) (discussing the vast public school speech case law).

43. *See supra* text accompanying note 40.

44. *See, e.g.*, *Thayer v. City of Worcester*, 755 F.3d 60, 67 (1st Cir. 2014) (requiring ample alternative channels with a content-based speech restriction); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir. 2013) (same); *Reed v. Town of Gilbert*, 707 F.3d 1057, 1075 (9th Cir. 2013) (same), *cert. granted*, 134 S. Ct. 2900 (2014); *Local 5*, 595 F.3d 588, 596 (5th Cir. 2010) (same); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 958 (D.C. Cir. 1995) (same). The prohibition of “For Sale” residential lawn signs has been held both to be



that the speech regulation be content-neutral, reasonably or proportionately tailored to serve the substantial or significant government interest,<sup>45</sup> and, crucially, “that [it] leave open ample alternative channels for communication of the information.”<sup>46</sup> Courts typically view this content-neutral speech regulation test, which includes the above ample alternative speech channel requirement, as imposing merely intermediate<sup>47</sup> scrutiny rather than strict or heightened<sup>48</sup> scrutiny. On that basis, it amounts to a “less demanding” and “more lenient” judicial test.<sup>49</sup>

Significantly, though, a requirement that a regulation leave open anything such as ample alternative speech channels in the case of content-neutral speech regulations immediately destroys any hierarchy of rigor, exactingness, or stringency between the two tests. Nothing prevents a court, relying on the ample available alternative speech channels requirement, from imposing a more demanding test under content-neutrality than under a content-based test. It is possible for a conscientious, perceptive, and fair-minded court to thus strike down a speech regulation under a content-neutral test that it would uphold under the standard content-based test. Any hierarchy of rigor between the two tests is lost on this consideration alone.

In a sense, this should not be surprising. A crucial requirement commonly imposed in content-neutral restriction cases, but not in content-based restriction cases, could always be decisive and thus flip the

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content-based and to fail to leave the speaker with ample satisfactory alternative speech channels. See *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977) (relying in part on the alternative speech channels language in the distinctively commercial speech case of *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). Commercial speech regulations then received their own unique mid-level constitutional test in *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 566 (1980). *Linmark*, however, does not seem to determine or assume that the speech regulation at issue was content-based or ask about the availability of remaining alternative speech channels. If anything, the logic in *Linmark* seems to run in the other direction. Specifically, the Court seems to have used the absence of satisfactory remaining alternative speech channels as one indication that the speech regulation at issue was content-based. This seems roughly akin to the much more general process by which one might infer a legally wrongful intent from the actual or predictable consequences of the act in question. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 267–68 (1977). For further discussion of this aspect of the *Linmark* case, see *Wagner*, 577 Fed. App’x at 496–97. For a brief, more general discussion of *Linmark*, see *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (majority opinion).

45. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

46. *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

47. See, e.g., *Serv. Emps. Int’l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010).

48. See, e.g., *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

49. *Thayer v. City of Worcester*, 755 F.3d 60, 67 (1st Cir. 2014) (Souter, J., sitting by designation).

casually assumed hierarchy of rigor. Therefore, it is ill-founded to think of content-based tests as uniformly more demanding than content-neutral tests or of the latter as uniformly more lenient. The two sorts of tests can at a minimum easily cover much of the same ground or reach equivalent results—where content-neutral tests are not open to more demanding applications.

Perhaps the most important explanation for why these remarkable possibilities are not more widely noticed is the difficulty of distinguishing the ideas of alternative speech channels<sup>50</sup> from the genuinely separate idea of one degree or another of narrow tailoring. Perhaps there is a belief that one more or less implies the other. Also, some may believe that if there is any difference between the ample alternative speech channels question and that of the degree of narrow tailoring, the difference is likely to be murky or trivial. Furthermore, to the extent that courts choose a lax interpretation of the ample alternative speech channels requirement, the disruptive possibilities are less likely to be noticeable.

Thus, the differences between tailoring analysis and alternative speech channels analysis tend to be underappreciated, if recognized at all.<sup>51</sup> Yet the basic distinction between narrow tailoring and alternative speech channels remains. Years ago, Judge John Coffey of the U.S. Court of Appeals for the Seventh Circuit sensibly observed that

[t]he “ample alternative channels of communication” test is entirely separate from the “less restrictive means” test[.] “[Less restrictive means] denotes an inquiry into whether there are other *regulations* which are less restrictive of protected activity but protect the governmental interest served by the challenged regulation. The ‘ample alternative channels’ inquiry focuses on *methods of communication* . . . .”<sup>52</sup>

### Evaluation of concrete differences further clarifies the main difference

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50. For a general discussion of alternative speech channel analysis and a claim of its underappreciated constitutional significance, see generally R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

51. See, e.g., *Clark*, 468 U.S. at 298, 308 n.4 (detecting little meaningful difference between tests incorporating an ample alternative speech channel requirement and tests that do not, including the well-known symbolic or mixed speech and conduct case of *O'Brien v. United States*, 391 U.S. 367, 377 (1968), which required reasonable or proportionate tailoring—at a minimum—but with no reference to remaining speech channels).

52. *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1577 n.4 (7th Cir. 1986) (Coffey, J., dissenting) (second alteration in original) (quoting *Wis. Action Coal. v. City of Kenosha*, 767 F.2d 1248, app. 1254 n.3 (7th Cir. 1985)); see also *Tacyne v. City of Philadelphia*, 687 F.2d 793, 798 (3d Cir. 1982) (drawing a distinction between the adequate alternative forum requirement and the least restrictive analysis).

at stake—the difference between alternative government regulations of speech and alternative remaining avenues for communicating a message.<sup>53</sup> For one, consider a new restriction on speech that is far from narrowly tailored in that the restriction burdens substantially more speech than is necessary to promote the government interest at stake. In particular, imagine a prohibition of all battery-powered amplified speech by electoral candidates for the sake of a government interest in allowing local residents to enjoy the evening hours undisturbed by such speech.<sup>54</sup> The regulation, however, is not limited to the evening hours or to residential areas, and thus might prohibit a fair amount of harmless candidate speech using the technology in question. While the regulation might be underinclusive with respect to its stated goal, it is also grossly overinclusive<sup>55</sup> and thus not especially narrowly tailored on any convincing calculus.<sup>56</sup>

This lack of tailoring between the actual impact of the ordinance and the scope of its intended purpose does not mean, however, that the above prohibition adversely affects the free speech interests and values of any of the electoral candidates or listeners in question. Any speech restriction, whether narrowly tailored or not, may leave available to the affected speakers a wide range of realistic, effective alternative speech channels—channels perhaps even more promotive of the speaker's own free speech interests and free speech values<sup>57</sup> than any channel formerly used but now prohibited. Speakers in the hypothetical case mentioned above might easily utilize non-battery-powered amplification systems or switch to other equally or more effective speech media.

A government regulation thus may block communication channels *A* and *B* where blocking only channel *A* would promote the government's interest just as well. But from the speaker's free speech value perspective,<sup>58</sup> the remaining unregulated alternative speech channels *C*, *D*, and *E* might be just as desirable as *A* and *B*, if not even more

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53. See *supra* note 52.

54. For a sense of the value of residential and other tranquility interests, see *Ward v. Rock Against Racism*, 491 U.S. 781, 791–92 (1989); *Frisby v. Schultz*, 487 U.S. 474, 477 (1988); *Kovacs v. Cooper*, 336 U.S. 77, 96–97 (1949) (Frankfurter, J., concurring) (sound truck “noise” case).

55. See *Ward*, 491 U.S. at 799–800.

56. See *id.* This example involves a presumably content-based restriction, so the tailoring requirements imposed on content-neutral regulations in *Ward* should still apply, at a bare minimum.

57. For respected discussions of mainstream values, purposes, aims, or reasons underlying the special constitutional protection of speech, see, for example, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 154–55 (1989); see also *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis & Holmes, J.J., concurring) (discussing the reasons why the founding fathers believed freedom of speech was necessary).

58. See, e.g., the authorities cited *supra* note 57.

constitutionally valuable. This can be true even if the speaker might prefer, all things including non-free speech values considered, to use the now-prohibited speech channel *A*. Speakers may not want to maximize any combination of message clarity, articulateness, size or desirability of audience, memorability, logical or emotional appeal, message retrievability, convenience, or cost effectiveness. A speaker may well have other non-free speech values in mind. An all-things-considered preferred channel for speaking may, for example, allow the speaker to better coerce or intimidate others, to repay a favor, to win some unrelated financial benefit, to maximize sheer name recognition and prestige, to project a deceptive image, or to increase corporate profits in some other context.

Imagine a case of a perfectly tailored regulation that effectively targets all of the sources of some perceived harm and nothing that is not a source of that harm.<sup>59</sup> The harm in question might be, for example, the disturbed sleep of persons in their residences. Does this perfect regulatory tailoring convey anything at all about whether any speakers still have realistically available one or more equally or more constitutionally valuable ways of conveying their message? Clearly the answer is no. Any given speakers might find that this perfectly narrowly tailored regulation either has left them largely without a voice or has had no adverse effect—if not a positive effect—on realizing their own free speech values.<sup>60</sup>

The tailoring and alternative speech channels inquiries thus have very little to do with one another.<sup>61</sup> Crucially for this Essay's purposes, an alternative speech channels requirement can impose different and more stringent free speech requirements than can even the most exacting narrow tailoring requirements. Thus, a content-neutral regulation test requiring ample alternative speech channels can be more demanding than a content-based regulation test requiring a compelling interest and narrow tailoring.

To better see this possibility, consider the logic of the debate over alternative speech channels between the majority and the dissenters in *City of Renton v. Playtime Theatres, Inc.*<sup>62</sup> That case involved an ordinance imposing proximity zoning limits on the locations of adult

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59. See *Ward*, 491 U.S. at 799–800 (content-neutral context). In the context of content-based speech regulations, see the narrow tailoring discussions in *Wright*, *Fourteen Faces of Narrowness*, *supra* note 8.

60. See *supra* note 57 and accompanying text; see also R. George Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149, 150–56 (1986) (referencing broad formulations of free speech values).

61. One might thus say that the requirements of narrow tailoring and of alternative speech channels can be orthogonal vectors of variable magnitudes.

62. 475 U.S. 41 (1986).

movie theaters.<sup>63</sup> The Court divided over whether the ordinance was content-neutral,<sup>64</sup> with the majority concluding that because the ordinance was justified by the movie theater's secondary or social effects<sup>65</sup> unrelated to the content of the speech,<sup>66</sup> the regulation could be treated as content-neutral.<sup>67</sup>

Assuming the content-neutrality of the zoning regulation in question, the Court was then required to consider whether the regulation met the alternative speech channels element of the test for content-neutral regulations of speech.<sup>68</sup> Not surprisingly, there is room for judicial discretion in applying the test in practice,<sup>69</sup> as well as generous room for variations in how, precisely, this requirement is to be formulated in the first place.

The canonical formulation of the alternative speech channels element of the test for content-neutral regulations holds that a restriction must "leave open ample alternative channels for communication of the information."<sup>70</sup> Departures from that particular formulation arise, however, and each such departure has some potential for encouraging or discouraging a rigorous or a relaxed interpretation of this content-neutral test element.

Thus, the *City of Renton* majority and dissenters referred, variously, to a requirement that the speech regulation "not unreasonably limit alternative avenues of communication";<sup>71</sup> "allow[] for reasonable alternative avenues of communication";<sup>72</sup> "refrain from effectively denying . . . a reasonable opportunity to [in this case] open and operate an adult theater within the city";<sup>73</sup> or more generously, "leave open ample alternative channels for communication of the information,"<sup>74</sup> or "provide [as opposed to merely 'allow'] for reasonable alternative

63. *See id.* at 43.

64. *Compare id.* at 48–49, *with id.* at 55–57 (Brennan, J., dissenting).

65. *See id.* at 49 (majority opinion).

66. *See id.* at 48 (defining content-neutral regulations as "those that 'are justified without reference to the content of the regulated speech'" (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976))).

67. *City of Renton*, 475 U.S. at 48. Whether an ordinance expressly restricting only adult movie theaters is "really" content-neutral, or should for various pragmatic, normative, or jurisprudential reasons be treated as content-neutral, as a kind of legal fiction, is not entirely clear. *See generally* LON L. FULLER, *LEGAL FICTIONS* (reprint ed. 1968).

68. *See id.* at 47, 53–54.

69. *Compare id.* at 53–54 (requirement met), *with id.* at 63–65 (Brennan & Marshall, JJ., dissenting) (requirement not met).

70. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1983).

71. *City of Renton*, 475 U.S. at 47 (majority opinion).

72. *Id.* at 53.

73. *Id.* at 54.

74. *Id.* at 63 (Brennan, J., dissenting) (quoting *Clark*, 468 U.S. at 293).

avenues of communication.”<sup>75</sup> A moment of inspection reveals that these formulas are not all equivalent and that some are more demanding than others.

A regulation may not, for example, limit—reasonably or unreasonably—a speaker’s alternative channels of communication<sup>76</sup> if no such alternative channels ever existed. More substantively, a difference clearly exists between emphasizing a mere allowance for alternative channels<sup>77</sup> and requiring their actual presence in ample measure.<sup>78</sup>

For this Essay’s purposes, the most interesting judicial options in this context are the most speech protective<sup>79</sup> because they illustrate a crucial point: Rigorously interpreted content-neutral regulation tests can be as demanding—actually, more demanding and more speech protective—than typical content-based regulation tests that lack any such requirement.<sup>80</sup>

The realistic possibility that the “ample alternative speech channels” requirement could result in a content-neutral regulation test that is more rigorous than the strict scrutiny of content-based regulation tests<sup>81</sup> is hinted at in the dissent in *City of Renton*.<sup>82</sup> The dissenters in that case would have held unconstitutional the minimum distance zoning requirements for adult theaters for failing to leave open ample alternative channels.<sup>83</sup> While the ordinance left about five percent of the city’s land unregulated, much of the five percent was either already occupied or else unsuitable for use as a movie theater.<sup>84</sup> The Free Speech Clause clearly does not guarantee commercial profitability of adult theaters in every jurisdiction.<sup>85</sup> But according to the dissenters, the ample available speech channels requirement should prohibit consigning such speakers to great

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75. *Id.* at 64.

76. *See id.* at 47 (majority opinion).

77. *See, e.g., id.* at 53.

78. *See, e.g., id.* at 63–64 (Brennan, J., dissenting).

79. For case language sufficient to establish such potential, see *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark*, 468 U.S. at 293; *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Phelps-Roper v. Koster*, 713 F.3d 942, 954 (8th Cir. 2013).

80. *See, e.g.,* sources cited *supra* note 11.

81. *See* sources cited *supra* note 11.

82. *See City of Renton*, 475 U.S. at 63–65 (Brennan, J., dissenting).

83. *See id.* at 64.

84. *See id.*; *see also* *Lund v. City of Fall River*, 714 F.3d 65, 70–72 (1st Cir. 2013) (Souter, J., sitting by designation) (“If a zoning code passes muster as a time, place, and manner regulation, if it is content neutral, and if it advances a substantial governmental interest, the question remaining is whether it leaves reasonable means of commercial adult activity as an alternative to its restrictions.”).

85. *See City of Renton*, 475 U.S. at 54 (majority opinion).

restriction<sup>86</sup> or to the most unattractive, inaccessible, inconvenient, unavailable, or unusable areas<sup>87</sup> of the city, lest the speakers not have a realistic and reasonable<sup>88</sup> opportunity to convey their message.

More recent cases have also hinted at the potentially demanding character of an ample alternative channels requirement. The Court in *McCullen v. Coakley*,<sup>89</sup> for example, illustrated the possibility of judicial sensitivity to distinct free speech values and aims at the level of the particular speaker.<sup>90</sup> Not all speakers have similar priorities, aims, resources, audiences, time frames, capacities, and limitations.<sup>91</sup> For some speakers, the opportunity to distribute leaflets on a street in practically unimpeded fashion, along with a similar opportunity to engage in face-to-face conversation,<sup>92</sup> may be invaluable. Such opportunities may not be realistically replaceable by alternative arrangements, including chanting, displaying signs, or other forms of protest.<sup>93</sup> But depending upon the contextual nuances, any one of these or other channels of communication might be essential to a speaker's ability to effectively convey the intended message.<sup>94</sup>

In some contexts, the ability to post a yard sign will not suffice as an alternative to a speech channel permitting a detailed verbal argument.<sup>95</sup> In other contexts, as in a neighbor speaking to neighbors, the realistic free

86. See *id.* at 64 (Brennan, J., dissenting).

87. See *id.* at 65; see also *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1529–30 (9th Cir. 2001) (establishing a multifactor test excluding and including various cost considerations).

88. See *City of Renton*, 475 U.S. at 65. The realism of an opportunity to speak requires attention not only to the available channels as of the time a speech restriction is first adopted, but also as of the later time one actually wishes to speak. For a discussion of this, see *TJS of N.Y., Inc. v. Town of Smithton*, 598 F.3d 17, 22–26 (2d Cir. 2010).

89. 134 S. Ct. 2518 (2014).

90. See *id.* at 2536–37.

91. Query whether heads of social media enterprises much care whether they may attach cardboard posters to telephone poles, as in *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 791–93 (1984). Also note that most speakers will care about their available speech channels as of the time of their wish to speak, as distinct from the time the speech restriction was imposed. See *TJS of N.Y.*, 598 F.3d at 22–23.

92. See *McCullen*, 134 S. Ct. at 2536.

93. See *id.* Similarly, the colonial equivalent of a bumper sticker or vanity license plate would not have been adequate alternative speech channels for Thomas Paine. See generally THOMAS PAINE, *COMMON SENSE* (1776) (urging those in the American British colonies to seek independence from Great Britain).

94. See *id.* at 2536–37. Elsewhere, the Court has rightly recognized that a substantial burden on religious expression may remain if a state precludes one or more “channels” of religious practice while leaving other modes or “channels” of such practice unregulated. See the prisoner beard length case of *Holt v. Hobbs*, 135 S. Ct. 853, 861–64 (2015).

95. For example, Thomas Paine could not have spread his message so effectively without using his pamphlet, *Common Sense*. See PAINE, *supra* note 93.

speech value of a yard sign may exceed that of a speech channel allowing one to speak with more precision and detail.<sup>96</sup> In any given case, these practical differences among speech channels may be of decisive constitutional weight. The unavailability of yard signs may condemn the most vitally important and narrowly tailored speech regulation.<sup>97</sup> To the extent that courts choose to recognize and accord appropriate constitutional weight to such differences, a content-neutral regulation test with an ample alternative speech channels requirement might prove as or more demanding, and as or more speech protective, than a content-based “strict scrutiny” test without such a requirement.<sup>98</sup> If even a compellingly vital and precisely tailored content-neutral speech regulation fails on a rigorous interpretation to leave available ample alternative speech channels, then the hierarchy and meaningfulness of the distinction between content-based and content-neutral regulations evaporates.

### III. THE INCREASINGLY MURKY BACKGROUND AGAINST WHICH ALTERNATIVE SPEECH CHANNEL ANALYSIS NOW TAKES PLACE

#### A. *Strict Scrutiny and Required Degrees of Evidentiary Weight*

In some content-based regulation cases of late, courts have, in effect, added what amounts in practice to a further requirement to the two strict scrutiny elements of a compelling government interest and narrow tailoring.<sup>99</sup> In such cases, the government must do more than plausibly cite a properly formulated compelling government interest and present a plausible claim that the interest will in fact be sufficiently advanced. Instead, in such cases, the regulation’s evidentiary and causal bases “must be compelling and not merely plausible,”<sup>100</sup> and the government must “present a compelling basis”<sup>101</sup> for its causal theory. This is plainly not

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96. See *City of Ladue v. Gilleo*, 512 U.S. 43, 56–57 (1994) (“[A] person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means.”); see also *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977) (stating the alternative speech channels remain “far from satisfactory”).

97. See *City of Ladue*, 512 U.S. at 57.

98. Courts often adopt a less rigorous and less speech-solicitous approach toward alternative speech channels analysis. See, e.g., *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 958 (D.C. Cir. 1995) (analyzing alternative speech channels).

99. See, e.g., *supra* notes 11–12 and accompanying text.

100. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001) (quoting influential Judge Richard Posner in this commercial violent video game regulation case).

101. *Id.* Alternatively, courts addressing a sufficient evidentiary basis issue might, at least in some content-neutral regulation cases, adopt a more deferential “substantial evidence” requirement. See, e.g., *Turner Broad. Syst. v. FCC*, 520 U.S. 180, 196 (1997) (calling for judicial deference to congressional findings “as to the harm[s] to be avoided and to the remedial measures adopted”); see also *Edwards v. District of Columbia*, 755 F.3d 996, 1003 (D.C. Cir. 2014) (requiring a substantial evidentiary basis in a D.C. tour guide speech regulation case).



the same as plausibly citing in good faith a compelling government interest.<sup>102</sup> The “compelling evidentiary basis” requirement thus changes the practical decisional dynamic.

The Supreme Court has on recent occasions endorsed this second and separate sense in which “compellingness” must appear in some content-based<sup>103</sup> speech regulation cases. Beyond what is normally a standard narrow tailoring, precision of fit, or an overinclusiveness or underinclusiveness inquiry,<sup>104</sup> the Court has demanded “compelling” evidence<sup>105</sup> or unambiguous<sup>106</sup> proof of causation<sup>107</sup> as distinct from mere correlation<sup>108</sup> regarding the regulation and the underlying harm to be addressed. As Justice Anthony Kennedy has discussed the requirement elsewhere, “to recite the Government’s compelling interests is not to end the matter.”<sup>109</sup> A “direct causal link between the restriction imposed and the injury to be prevented”<sup>110</sup> must then be proven.<sup>111</sup>

Where this additional “compelling evidence” requirement exists, the constitutional rigor of the test is, justifiably or unjustifiably, distinctly enhanced without affecting the alternative speech channels dynamic or any other consideration.

102. See *supra* note 12 and accompanying text. It would not be surprising if the breadth or narrowness of the formulation of the allegedly compelling interest affected the amount of available causal evidence and thus whether there is a compelling evidentiary basis for the regulation.

103. At some point, similar evidentiary demands as to causation might exist in content-neutral speech regulation cases, but for the moment, this possibility seems largely hypothetical.

104. See, e.g., *supra* note 12 and accompanying text.

105. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738–39 (2011).

106. See *id.* at 2739.

107. For a discussion of some important, if not always fully appreciated, problems in proving causation to any particular degree, see, for example, Paul Humphreys, *Causation in the Social Sciences: An Overview*, 68 SYNTHESE 1, 1 (1986); Jim Manzi, *What Social Science Does—and Doesn’t—Know*, CITY J., Summer 2010, available at [http://www.city-journal.org/2010/20\\_3\\_social-science.html](http://www.city-journal.org/2010/20_3_social-science.html). For a broader discussion of some questions of causality in the strict scrutiny context, see R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 64 FLA. L. REV. 759, 774 (2012).

108. See *Brown*, 131 S. Ct. at 2739.

109. *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (plurality opinion).

110. *Id.*

111. Justice Kennedy’s requirement that the regulation be “actually necessary,” *id.*, to achieve the cited government interest seems to suggest a conventional understanding of narrow tailoring. If anyone insists, it is also possible to describe this requirement as demanding that the tailoring itself be “compelling.” The point is that *Alvarez*, *Brown*, *Kendrick*, and similar cases require both a compelling government interest and a compelling evidentiary case for the relevant causal linkages involved, even when describing the required stringent proof of causation as a matter of narrow tailoring.

### B. *Judicial Self-Indulgence in Narrow Tailoring Determinations*

The occasional dual role of “compellingness” thus renders murky the broader background against which separate decisions about alternative speech channels must operate. Additional murkiness results from occasional judicial self-indulgence in declaring hypothetical regulatory schemes to be both feasible and less speech restrictive overall, or perhaps more narrowly tailored than the regulatory scheme actually adopted in a given case.

In these narrow tailoring feasibility cases, the most typical problem is not that the court misguidedly rules out a more narrowly tailored hypothetical regulation as infeasible where that regulation would in fact be viable. More frequently, the problem is the court’s questionable conclusion, based on a limited judicial record, that some hypothetical regulatory scheme would really be viable and sufficiently effective in practice.

As one illustrative problem among many,<sup>112</sup> consider that a court’s striking down of a particular regulatory practice—perhaps a thirty-five-foot speech buffer zone<sup>113</sup>—might itself change the incentives and the dynamics as between the government and regulated speakers. The future behavior of a perhaps increased number of speakers under a new rule cannot be read off of prior historical practice under a rule now declared invalid.<sup>114</sup> Nor will the actual extent or depth of a government’s historical good faith and reasonable consideration of arguably<sup>115</sup> less intrusive speech regulations invariably be clearly evident from the judicial record.<sup>116</sup> To the extent that judicial determinations as to the realistic

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112. For additional problems, including those involving simultaneous narrow tailoring to multiple and varied state interests, see Wright, *supra* note 107, at 772–73.

113. See *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014).

114. Consider the more static, historically-oriented analysis in *McCullen*. *Id.*

115. Again, it is difficult to believe that based on the judicial record, a reviewing court can typically consider the various short- and long-term free speech benefits—and costs—of a supposedly less restrictive rule on not only the parties before the court, but also on other actual and potential speakers with no voice in the particular case at hand. Even parties involved in the litigation may emphasize their own overall interests as distinct from their narrow free speech interests.

116. Note the willingness of the Court in *McCullen* to debate the Commonwealth of Massachusetts on these and related, often rather fact intensive, hypothetical matters. See *McCullen*, 134 S. Ct. at 2539–40. Effective doctrinal constraints on reviewing courts’ aggressiveness or undue deference on such matters seem limited. For other instances of questionable judicial second-guessing of government policies on what appear to be particularized, sensitive, complex, evolving, multidimensional, predictive empirical matters, with limited realistic check on judicial speculation, see, for example, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 506–09 (1996) (plurality opinion) (commercial speech regulation test); *Speet v. Schuette*, 726 F.3d 867, 880 (6th Cir. 2013) (declaring that the state interest in preventing fraud could be promoted effectively in a more narrowly tailored way by literally prohibiting fraud, as

feasibility and effects of merely hypothetical speech regulations involve judicial speculation on subtle and complex matters, the impact of the tailoring test again loses clarity and determinacy.

### C. *Re-valuing the Weight of Re-describable Government Interests*

The familiar distinction between compelling government interests<sup>117</sup> and non-compelling government interests is essential to any meaningful difference between tests for content-based and content-neutral regulations of speech.<sup>118</sup> Despite its familiarity, this distinction is much more problematic than courts commonly recognize. Regardless of the distinction's apparent rigor, finding or not finding a compelling government interest is a surprisingly manipulable enterprise.

Formalistically, a compelling interest is described as "of the highest order,"<sup>119</sup> "overriding,"<sup>120</sup> or "paramount."<sup>121</sup> However, this apparent rigor has not prevented courts from recognizing, for example, the general protection of the golden, and not merely bald, eagle as a genuinely compelling government interest, whether either species is threatened or not.<sup>122</sup> Protection of the planet—and thus presumably protecting the otherwise non-threatened golden eagle—from catastrophic climate change would also count as a compelling government interest or as a

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opposed to prohibiting begging to prevent fraud). For an exceptionally critical judicial response to this sort of narrow tailoring jurisprudence, see *Berger v. City of Seattle*, 569 F.3d 1029, 1062 (9th Cir. 2009) (Kozinski, C.J., dissenting) ("Fortunately for my colleagues, *their* proposed solutions don't need to pass constitutional muster; they can just toss them out as supposedly superior alternatives. But if the city were gullible enough to follow these suggestions, my colleagues would find reasons to strike down the new rules in the next round of litigation.").

117. See Stephen E. Gottlieb, *Compelling Governmental Interest: An Essential but Unanalyzed Term in Constitutional Adjudication*, 86 B.U. L. REV. 917, 923–24 (1988) (providing general background information on this distinction).

118. See *supra* notes 5, 12 and accompanying text; see also *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (holding that the content-based speech restriction at issue could stand only if it satisfied strict scrutiny); *Norton v. City of Springfield*, 768 F.3d 713, 723 (7th Cir. 2014) (same).

119. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (referring to the religion, rather than speech, context).

120. *United States v. Lee*, 455 U.S. 252, 257 (1982) (religion clause context).

121. *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (free speech context).

122. See *United States v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011) ("[T]he government has a compelling interest in protecting the bald eagle as our national symbol, and the golden eagle, as its survival and the survival of the bald eagle are intimately intertwined. The removal of the bald eagle from the list of species protected under the Endangered Species Act does not render this interest a nullity; . . . 'whether there [are] 100 eagles or 100,000 eagles,' the government's interest in protecting them remains compelling." (alteration in original) (quoting *United States v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002))). This example is provided to demonstrate how courts use broader, compelling interests to justify regulation of narrower, not nearly as compelling interests—not to minimize the importance of environmental concerns in general.

paramount interest of the highest order. However, placing these two separate interests in the same constitutional category, by itself, impeaches the credibility and the jurisprudential value and integrity of that category.

Elsewhere, the Supreme Court has chosen to classify “public safety on . . . streets and sidewalks” as well as fundamental federal constitutional rights-based “access to . . . healthcare facilities” as, by contrast, merely “undeniably significant.”<sup>123</sup> It is also apparently the case that, at least for the present, “a municipality’s asserted interests in traffic safety . . . while significant, have never been held to be compelling.”<sup>124</sup> On the other hand, “[w]hile it is true that there are no authoritative cases holding that a traffic concern satisfies the ‘compelling interest’ test, nor are there authoritative cases holding that a traffic concern cannot satisfy the test.”<sup>125</sup>

It is perhaps not surprising that courts tend not to think of traffic safety as a compelling government interest. The problem, though, is that traffic safety and various other broadly related interests can be reframed, reconceptualized, re-described, elevated to a more generalized level, or thought of entirely apart from closely related and overlapping interests. Traffic safety can be reconceived as preventing deaths. With some manipulation, interests that are often judicially deemed merely substantial, and thus insufficient under strict scrutiny, can be promoted to the ranks of compelling government interests and thus potentially sufficient even under strict scrutiny for content-based regulations.

For example, consider that genuinely promoting the safety of pedestrians, users of sidewalks and medians, and of drivers can often be re-described as promoting the avoidance of serious bodily injury and premature death. In various contexts, unsurprisingly, some aspect of the public’s basic physical safety is easily described as compelling and thus as potentially sufficient even under strict scrutiny.<sup>126</sup> If there is no

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123. *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) (assuming that the speech regulation in question was content-neutral); *see also* *Brown v. Town of Cary*, 706 F.3d 294, 305 (4th Cir. 2013) (“It is beyond dispute that the Town’s stated interests in promoting aesthetics and traffic safety are substantial.” (citing *Arlington Cnty. Republican Comm. v. Arlington County*, 983 F.2d 587, 594 (4th Cir. 1993))).

124. *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 737–38 (8th Cir. 2011) (quoting *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995)) (internal quotation marks omitted).

125. *Westchester Day Sch. v. Village of Mamaroneck*, 386 F.3d 183, 191 (2d Cir. 2004).

126. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (labeling the state interest in protecting the physical and psychological safety of a minor as compelling in a child pornography possession context); *Johnson v. City of Cincinnati*, 310 F.3d 484, 502 (6th Cir. 2002) (“[T]o enhance the quality of life in drug-plagued neighborhoods and to protect the health, safety, and welfare of citizens in those areas—represents a compelling government interest.”); *Tanks v. Greater Cleveland Reg’l Transit Auth.*, 930 F.2d 475, 480 (6th Cir. 1991) (noting a “compelling government interest in protecting public safety” in a public bus driver drug testing context); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1992) (en banc) (“A ‘compelling

discernible principle establishing when safety—of persons, and certainly of non-threatened golden eagles—is compelling, the meaningfulness of a content-based versus content-neutral regulation distinction is undermined and impeached. Even the most careful judicial choices among broader and narrower formulations of an interest are often readily and deeply contestable.<sup>127</sup>

Finally, to the extent that determining whether any given interest, however formulated, is compelling must depend on empirical evidence in any sense, the determination is inevitably prisoner to the various crucial limitations on the validity and reliability of such evidence available to the courts in a given case.<sup>128</sup>

### CONCLUSION

The binary distinction between content-based and content-neutral regulations of speech may seem reasonably<sup>129</sup> clear. The respective constitutional tests may also seem hierarchical in their stringency. This Essay, however, takes issue with both claims. The requirement of ample remaining alternative speech channels in content-neutral but not content-based regulation cases, by itself, upsets any hierarchy of stringency as between the two tests. Additionally, the cumulative effect of the alternative speech channels requirement, along with the other trends and phenomena outlined above, is to undermine the meaningfulness of the

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interest' is one that has a 'clear justification . . . in the necessities of national or community life'" and that averts a clear and present danger to the public (omission in original) (citations omitted) (quoting *Bolling v. Superior Court for Clallam Cnty.*, 132 P.2d 803, 809 (Wash. 1943))).

127. For a theoretical introduction to a closely related problem, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1059 (1990). Among the cases, a debate exists between Justices Antonin Scalia and William Brennan. Compare *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion of Scalia, J.), with *id.* at 140–41 (Brennan, J., dissenting). More recently, Justices have disputed the proper breadth or narrowness of the chosen interest formulation. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014) (assuming "that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling"); *id.* at 2785–86 (Kennedy, J., concurring) (noting, in a more broadly formulated manner, that "the mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees"); *id.* at 2799 (Ginsburg, J., dissenting) ("[T]he contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence."); see also *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998) (noting that "public health is a compelling governmental interest").

128. See sources cited *supra* note 107. Even in subject matters conducive to such inquiry, the severity of the various practical problems seems to be quite substantial. See generally John P.A. Ioannidis, *Why Most Published Research Findings Are False*, 2 PLoS MED. 0696 (2005) (discussing the implications of faulty research).

129. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, ch. 3 (W. D. Ross trans., Oxford rev. ed., 2000) (350 BC) (stating that one should "look for precision in each class of things just so far as the nature of the subject admits").

judicially created binary distinction between content-neutral and content-based regulations of speech. At this point, the distinction is, in its various dimensions and manifestations, more trouble than it is worth.